KETUA PENGARAH, KASTAM DAN EKSAIS DIRAJA MALAYSIA

v.

ATLANTIC SCOPE (M) SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' V.C. GEORGE JCA
DATO' HJ. ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NO : W-01-2-94]
13 FEBRUARY 1995

***CUSTOMS & EXCISE** : Importation of goods in contravention of the Customs Act 1967 - Offending goods seized by Customs & Excise Department - Goods returned on provision of security deposit - Returned goods exported - Respondent not charged with any offence - Appellant offering to compound offence - Respondent refusing to pay compound - Whether appellant entitled to forfeit security deposit - Consideration of ss. 115, 128 & 131 of Customs Act 1967.*

The respondent illegally imported 1,840 cartons of cigarettes from Singapore in contravention of the Customs Act 1967 (the Act). The appellant called upon the respondent to provide a security deposit for the return of the seized goods. The respondent provided the security deposit and exported the seized goods.

The appellant subsequently offered to compound the offence. The respondent refused to pay the compound and sought the return of the security deposit. The learned trial Judge ordered the return of the security deposit less the compound fee, hence the appeal.

The appellant argued that the learned trial Judge had erred in not giving effect to s. 131(3) of the Act. The appellant further argued that, as there was no prosecution of the respondent, they were empowered under s. 128(1) of the Act to forfeit the security deposit.

Held:

[1] The security deposit was, in fact, called for in exercise of the powers under s. 115(b) of the Act. In the circumstances, the learned Judge could not possibly have acted under s. 131(3) of the Act to order forfeiture of the amount deposited. It was clearly established in this case that no prosecution of the respondent ever took place. It follows that no order under s. 127(1A) of the Act for forfeiture of the security deposit could be or was made.

[2] Section 128(1) of the Act is not applicable to assist the appellant to have the security forfeited. In the circumstances of the present case, forfeiture must be confined to "such goods" and the proceeds of sale under paragraph (c) of s. 115. The security deposit provided under para (b) thereof cannot be forfeited under s. 128(1). What is deemed to be forfeited at the expiration of one calendar month of such seizure is "such goods" and the proceeds of such sale and the deeming provision of the section looses its steam by the words "unless under (c) such goods are returned under para (a) or (b) (of s. 115)".

[3] It is therefore clear that the learned Judge was correct in holding that the amount held as the security deposit could not be forfeited as claimed by the appellant or at all.

[Appeal dismissed with costs].

[**Bahasa Malaysia** Tanslation of Headnote]

KASTAM & EKSAIS*: Pengimpotan barangan yang melanggari Akta Kastam 1967 - Barangan yang menyalahi disita oleh Jabatan Kastam & Eksais - Barangan dikembalikan atas pemberian deposit jaminan - Barangan yang dikembalikan diekspotkan - Responden tidak didakwa atas apa-apa kesalahan - Perayu menawar untuk mengkompaun kesalahan - Responden enggan membayar kompaun - Samada perayu berhak untuk merampas deposit jaminan - Pertimbangan ss. 115, 128 dan 131 Akta Kastam 1967.*

Responden telah secara haram mengimpot 1,840 karton rokok daripada Singapura yang menyalahi Akta Kastam 1967 (Akta tersebut). Perayu telah meminta responden memberikan satu deposit jaminan bagi pengembalian semula barangan yang disita itu. Responden telah memberikan deposit jaminan tersebut dan telah mengekspotkan barangan yang disita itu.

Perayu berikutan itu menawar untuk mengkompaun kesalahan tersebut. Responden enggan membayar kompaun tersebut dan memohon supaya deposit jaminan dikembalikan. Puan Hakim perbicaraan yang bijaksana memerintahkan pengembalian deposit jaminan itu dengan ditolak fee kompaun, yang menyebabkan rayuan ini.

Perayu berhujah bahawa Puan Hakim perbicaraan yang bijaksana telah tersalah pertimbangan dalam tidak menguatkuasakan s. 131(3) Akta tersebut. Perayu selanjutnya berhujah bahawa, oleh kerana tidak terdapat pendakwaan terhadap responden, mereka telah diberi kuasa di bawah s. 128(l) Akta tersebut untuk merampas deposit jaminan tersebut.

Diputuskan:

[1] Deposit jaminan tersebut telah pada hakikatnya, dikenakan dalam menlaksanakan kuasa-kuasa di bawah s. 115(b) Akta tersebut. Dalam keadaan tersebut, Puan Hakim yang bijaksana tentunya tidak boleh bertindak di bawah s. 31(3) Akta tersebut untuk memerintahkan perlucuthakan jumlah yang telah didepositkan. Ianya telah dengan jelasnya ditetapkan dalam kes ini bahawa pendakwaan terhadap responden tidak pernah berlaku. Adalah didapati bahawa tidak terdapat perintah di bawah s. 127(lA) Akta tersebut bagi perlucuthakan deposit jaminan yang mungkin atau pun telah dibuat.

[2] Seksyen 128(1) Akta tersebut tidak terpakai bagi membantu perayu dalam melucuthak jaminan tersebut. Dalam keadaan kes semasa ini, perlucuthakan haruslah dihadkan kepada "barangan yang sedemikian" dan hasil penjualan di bawah perenggan (c) s. 115. Deposit jaminan yang diberikan di bawah perenggan (b) dengan itu tidak boleh dilucuthak di bawah s. 128(l). Apa yang dianggapkan boleh dilucuthak pada perluputan tempoh satu bulan penyitaan yang sedemikian adalah "barangan yang sedemikian" dan hasil penjualan yang sedemikian dan peruntukan yang dianggapkan dari seksyen tersebut tidak lagi berkuatkuasa oleh perkataan-perkataan "kecuali di bawah (c) barangan yang sedemikian dikembalikan di bawah perenggan (a) atau (b) (s.115)".

[3] Ianya adalah dengan itu jelas bahawa Puan Hakim yang bijaksana telah memutuskan dengan betulnya bahawa jumlah yang dipegang sebagai deposit jaminan tidak boleh dilucuthak sepertimana yang dituntut oleh perayu.

[Rayuan ditolak dengan kos].

Legislation referred to:
Customs Act, 1967 ss. 114(1), 115(1)(b), 131(1), (2) and (3), 127(1A), 128(1), (4)

For the appellant - Hazman bin Ahmad; Federal Counsel
For the respondent - Harpal Singh Grewal; M/s A.J. Ariffin Choo & Harpal

JUDGMENT

Hj. Abu Mansor Bin Ali JCA:

This is an appeal against the judgment of Y.A. Dato' Siti Norma Yaakob granting the respondent's application with an order returning the security deposit in the hands of the appellant in the sum of RM1,158,224.80 less the RM5,000 payable to the appellant as a compound to this offence allegedly committed by the respondent. After hearing learned Counsel for the appellant we found that there was no merit in the appeal and we dismissed it with costs. We now give our reasons.

In June 1993 the respondent illegally imported 1,840 cartons of cigarettes from Singapore in contravention of the Customs Act, 1967. The appellant pursuant to their powers under s. 114(l) of the Act seized these offending goods on 20 August 1993.

As the appellant's decision was to return the goods, the appellant, on 2 September 1993, acting under s. 115(l)(b) of the Act, called upon the respondent to provide a security deposit and when that was done had the goods returned with a further condition that the goods were to be exported. The respondent having paid the amount of RM1,158,224.80 as security deposit called for, exported the returned goods. It is relevant to set down this s. 115(1)(b) and it reads:

> 115. Return or disposal of movable property.
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> (1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion -
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> (a) - not applicable.
>
> (b) return the movable property to the owner thereof or to the person from whose possession, custody or control it was seized, or to such person as a senior officer of customs may consider entitled thereto, with liberty for the person to whom the movable so returned to dispose of same, such return being subject to security being furnished to the satisfaction of a senior officer of customs in an amount not less than an amount which, in the opinion of a senior officer of customs, represents-
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> (i) the open market value of such property on the date on which it is so returned;
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> (ii) the customs duty payable in respect thereof; and
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> (iii) any tax payable in respect thereof under any written law,
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> for the payment of the amount so secured to the Director General in the event of the Court making an order for the forfeiture of such amount under s. 127 (1A) or 128(4); or
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> (c) sell or destroy the movable property, as appropriate in the circumstances, where it is a living creature or where, in the opinion of a senior officer of customs, it is of a perishable or dangerous nature or likely to speedily deteriorate in quality or value, and where it is so sold, he shall hold the proceeds of sale to abide the result of any prosecution or claim.

We observed that for reasons known only to the appellant the respondent's offence was regarded as not that serious. Following this view taken by the appellant they sent a letter to the respondent on 19 January 1994 compounding the alleged offence. Para 3 of the said letter read:

> 3. Dengan kuasa yang diberi kepada saya di bawah s. 131 Akta Kastam 1967, saya dengan ini menawarkan supaya kesalahan-kesalahan tersebut dikompaun sebanyak RM5,000 (Ringgit

Malaysia Lima Ribu Sahaja). Sekiranya tuan menerima tawaran kompaun ini, kesalahan tersebut akan selesai disini dan tidak akan dibawa ke Mahkamah. Barang-barang yang telah dirampas, jika ada, akan dilucut hak.

4. Tawaran kompaun ini hendaklah dijelaskan dalam tempoh 14 hari dari tarikh surat ini. Kegagalan tuan berbuat demikian akan membolehkan bahagian ini mengambil tindakan Mahkamah.

The respondent failed to pay the amount of compound demanded. In the normal course of events, the respondent having been given time to pay and the period having elapsed, the appellant could have charged the respondent with an offence. This was not done. The respondent then brought an originating summons dated 16 February 1994 against the appellant praying for an order or orders that the appellant do return the security deposit saying that it was not forfeitable. The learned Judge after hearing argument concluded that the security deposits be returned less the RM5,000 to be paid as compound fee. Hence this appeal.

Before us the learned Federal Counsel appearing for the appellant strenuously contended that the learned Judge erred in the order she gave and she erred in her interpretation of the Customs Act and the relevant provisions thereof.

Firstly he said that the learned Judge erred in not giving effect to s. 131(3) of that Act. We set down s. 131(1), (2) and (3) of the Act in order that we might understand the argument thus:

131. Compounding of offences.

(1) Any senior officer of customs may compound any offence, which is prescribed to be a compoundable offence, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding five thousand ringgit.

(2) In like manner the proper officer of customs, not being a senior officer of customs, may compound any offence which is prescribed to be compoundable by such officer, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding one hundred ringgit.

(3) On the payment of such sum of money the person reasonably suspected of having committed an offence, if in custody shall be discharged, any properties seized shall be released and no further proceedings shall be taken against such person or property, unless the property consists of goods the import of which is prohibited in which case such goods shall be forfeited:

Provided that were the prohibition is conditional upon a licence being issued in respect of the import of such goods, a senior officer of customs may release such goods if a licence is subsequently issued by any relevant authority.

We were unanimous in informing the learned Federal Counsel that the security deposit was, in fact, called for in exercise of powers under s. 115(b) thereof "for the payment of the amount so secured to the Director General in the event of the Court making an order for the forfeiture of such amount under s. 127(lA) or s. 128(4); or.....". The panel was also unanimous that the learned Judge could not possibly have acted under s. 131(3) to order forfeiture of the amount deposited to the forfeiture under s. 127(lA) or s. 128(4). Hence his complaint on this ground did not make any headway with us.

It was clearly established in this case that no prosecution of the respondent ever took place. It follows that no order under s. 127(lA) of the Act for forfeiture of the security deposit could be or was made.

When pressed further as to where exactly the learned Judge erred, learned Counsel for the appellant argued that as there was absence of prosecution of the respondent in this case the appellant is empowered to proceed under s. 128(1) of the Customs Act giving the Director General of Customs power to have the security deposits forfeited bearing in mind the goods had already been released. Said in another way the learned Judge was, so they say, in error when she did not allow the appellant to forfeit the security deposits.

In order to appreciate the merit (if any) of the argument of the learned Federal Counsel, we set down s. 128(l) of the act. It reads:-

> 128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.
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> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of ss. (1) of s. 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration -
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> (a) a claim to such goods or the proceeds of sale of such goods is made under ss. (2);
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> (b) a written application is made for the return of such goods under paragraph (a) or (b) of ss. (1) of s. 115; or
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> (c) such goods are returned under the said paragraph (a) or (b).

We were unanimous in our views that s. 128(1) is not applicable to assist the appellant to have the security deposit forfeited in that, in the circumstances of the present case, forfeiture must be confined to "such goods" and the proceeds of sale under paragraph (c) of s. 115. The security deposit provided under para (b) thereof cannot be forfeited under s. 128(l). What is deemed to be forfeited at the expiration of one calendar month of such seizure is "such goods" and the proceeds of such sale and the deeming provision of the section looses its steam by the words "unless under (c) **such goods** are returned under para (a) or (b) (of s. 115)". It is clear that the security deposit is therefore not forfeitable in our view.

Accordingly we are unanimously agreed that the learned Judge was correct in holding that the amount held as the security deposit could not be forfeited as claimed by the appellant or at all.

Accordingly the appeal was dismissed with costs.